In re Forfeiture of One 1970 Chevrolet Chevelle

No. 81116-4

MADSEN, J. (concurring/dissenting)—This case presents the difficult question of what Alan and Stephne Roos "knew" about their son Thomas Roos' use of two family cars to carry out his drug dealing activities. Two of Thomas' arrests for possession of controlled substances led to the seizure and forfeiture of the family's Nissan Sentra (Nissan) and Chevrolet Chevelle (Chevelle). The Rooses claimed to be "innocent owners" under the exception to forfeiture in RCW 69.50.505 stating they had no knowledge of their son's drug activity in the family cars.

I agree with the majority that at the time the first car was seized pursuant to Thomas' arrest, the Rooses had no knowledge that their son was using the family cars to deal drugs. However, when Alan was called to the scene of Thomas' third arrest and shown the various controlled substances the officers retrieved from the car, including a 110-gram brick of cocaine, the Rooses gained knowledge that Thomas was using the family cars to deal drugs. The hearing officer was correct to infer that from that point on, the Rooses' denial of Thomas' drug activity amounted to burying their heads in the sand. Pet. for Review, App. 2, at 12. From the time of Thomas' third arrest, Alan and Stephne

were required to take all reasonable steps to prevent Thomas' further use of the family cars in order to qualify as innocent owners under the statute. *Tellevik v. 31641 W. Rutherford St.*, 120 Wn.2d 68, 88, 838 P.2d 111, 845 P.2d 1325 (1992).

Because the Rooses did not take steps to prevent Thomas' use of the second car, the Chevelle, even after they knew of his arrest in the Nissan with a 110-gram brick of cocaine, I would uphold the hearing officer's forfeiture of the Chevelle. I respectfully concur in part and dissent in part.

FACTS[1]

Thomas was arrested on June 10, 2005, when he was spotted unconscious in the driver's seat of his parents' Nissan in a car wash parking lot. A search of the vehicle incident to arrest uncovered various controlled substances, including methamphetamine and OxyContin pills, $21,406 in cash, and a drug ledger. The Nissan was impounded when Thomas was arrested. A notice of impound was mailed to Alan and Stephne's home address in Bothell.[2] After he posted bail, Thomas forged his father's signature on the tow company receipt to get the Nissan released from impound.

On July 3, 2005, Thomas was pulled over while driving a friend's vehicle and arrested for driving with a suspended license. A search of the vehicle incident to arrest

[1] Because I find that Stephne and Alan knew of Thomas' drug activity in the family cars at the time of his arrest in the Chevelle, more facts than the majority provides are necessary to my disposition of this case.

[2] Alan and Stephne own three properties in Washington. They reside at their Bothell residence. Thomas uses this address as his official address but rarely stayed there during the time of these events. Pet. for Review, App. 2, at 3. Alan and Stephne also own one property in Sedro Woolley, Skagit County, and one rental property in Seattle.

uncovered various controlled substances, including methamphetamine, cocaine, and OxyContin pills. Thomas was charged with felony possession of methamphetamine. Stephne was notified of Thomas' arrest and arranged to have bail posted for his release. Stephne testified to learning of his June 10, 2005, arrest in the family Nissan at that time.

On August 16, 2005, Thomas was again arrested in the family Nissan after being found unconscious in the driver's seat while parked in a convenience store parking lot. A search incident to arrest again uncovered various controlled substances, including OxyContin pills and a 110-gram brick of cocaine. Alan was called to the scene by Thomas' younger brother who had driven by as the arrest was underway. At the scene, police officers showed Alan the items uncovered during the search of the Nissan and served Alan with a notice of forfeiture of the car. Alan testified that he was shown the cocaine "brick" when he arrived at the scene. Stephne posted Thomas' bail for this August arrest.

Alan and Stephne are jointly registered as owners of the Nissan. Stephne is the sole registered owner of the Chevelle. On August 19, 2005, Alan mailed a handwritten claim for return of the Nissan. The letter stated: "I gave permission to my son, Thomas E. Roos, to borrow the car for temporary transportation. I was totally unaware of any uses or activities that may have occurred during the time." I Clerk's Papers (CP) at 42.

On September 1, 2005, Stephne was served by mail with notice of the forfeiture of the Nissan.

On September 9, Thomas was

arrested in the Chevelle after being found unconscious in the driver's seat while parked in a convenience store parking lot. A search of the vehicle incident to arrest again uncovered various controlled substances and cash. Stephne again posted bail for Thomas. The Snohomish Regional Drug Task Force seized the Chevelle at this time.

On September 10, Stephne mailed a letter for return of the Nissan stating: "Our son, Thomas E. Roos, borrowed the car for a short time on 8-15-05 and 8-16-05. We had no knowledge of what he was using the car for or contents in the car at that time." I CP at 52.

With these incidents and facts in mind, the hearing officer cited our decision in *31641 West Rutherford Street*, and *Escamilla v. Tri-City Metro Drug Task Force*, 100 Wn. App. 742, 753-54, 999 P.2d 625 (2000), to hold that from Thomas' July 3, 2005, arrest on, "[the Rooses] knew of his involvement with drugs." Pet. for Review, App. 2, at 11. He further commented that to qualify as an innocent owner, one cannot "'stick his/her head in the sand' to avoid" knowledge of illegal activity. *Id*. at 11-12. The hearing officer concluded, "The Roos[es] should have wondered whether and may well have actually feared that Thomas was using their family cars to traffic in drugs." *Id*. at 12.

The Court of Appeals affirmed the forfeiture of both cars and held substantial evidence supported the hearing officer's finding that Alan and Stephne were not innocent owners because "Alan and Stephne failed to demonstrate that they did not know, or should not have known, that Thomas was using [the cars] to facilitate the sale, delivery, or acquisition of controlled substances." *In*

re Forfeiture of One 1970 Chevrolet Chevelle, 140 Wn. App. 802, 822, 167 P.3d 599 (2007).

ANALYSIS

At issue in this case is the meaning of the word "knowledge." In Washington, all vehicles used in any manner to facilitate the sale, delivery, or receipt of controlled substances are subject to seizure and forfeiture. RCW 69.50.505(1)(d). In cases where the owner of the seized property is not also the perpetrator of the crime, the legislature has allowed for the possibility that the property be returned. Every owner who did not commit the crime giving rise to the forfeiture does not automatically qualify as an "innocent owner" under the statute. To qualify as an innocent owner, the claimant must establish that the "act or omission" leading to forfeiture was "committed or omitted without the owner's knowledge or consent." RCW 69.50.505(1)(d)(ii).

The meaning of the word "knowledge" is a question of law and is reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In *Campbell & Gwinn*, this court endorsed the idea that "'the plain meaning rule rested on theories of language and meaning, now discredited, which held that words have inherent or fixed meanings.'" *Id.* at 11 (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 48A:16, at 809-10 (6th ed. 2000)). "The plain meaning rule requires courts to consider legislative purposes of policies appearing on the face of the statute [as well as] background facts of which judicial notice can be taken." *State v. Riofta*, 166 Wn.2d 358, 365, 209 P.3d (2009) (internal quotation omitted).

In *Rozner v. City of Bellevue*, 116

Wn.2d 342, 348, 804 P.2d 24 (1991), we interpreted then-subsection (e) of the forfeiture statute which read: "'[T]he burden of producing evidence shall be upon the person claiming [to be the owner of the conveyance].'" In determining the meaning of the statute we noted:

> Where the legislative intent does not clearly appear on the face of the statutory language, as is the case here, in order to determine intent the court may resort to various tools of statutory construction.

Id. at 347.

The word "knowledge" is not defined in the statute. The lack of a definition in the statute leads the majority not to conclude that the phrase is ambiguous or in need of judicial construction, but rather that the word is susceptible to one and only one possible meaning: subjective, actual knowledge. Majority at 9-10. The majority finds that the definition of "knowledge" as "subjective knowledge" is simply, "common sense." *Id*. at 8 (it is "only common sense that when one says someone *knows* of something . . . actual knowledge is contemplated"). This approach contrasts with our decision in *31641 West Rutherford Street*, 120 Wn.2d at 88, where we noted that consent "is not defined in the statute" and turned to cases construing the federal forfeiture provision for guidance as to the meaning of "consent." Moreover, the majority's strong assertion is belied by the fact that the federal circuit courts of appeal have debated the meaning of the word "knowledge" in the identical federal forfeiture provision for years. *United States v. 1813 15th St., N.W.*, 956 F. Supp. 1029, 1035 (1997) ("Whether the claimant must prove absence of actual knowledge of the illegal activity or the more demanding burden of absence of constructive knowledge of the

illegal activity is a split issue amongst the circuits.") (citing cases). Further, in the context of criminal statutes, this court has had its own struggles with the meaning of the word "knowledge." *See State v. Shipp*, 93 Wn.2d 510, 514, 610 P.2d 1322 (1980) (redefining the application of statutory "knowledge" definition because "ambiguity in the interpretation of a knowledge instruction given in the words of the statute would seriously infringe on the rights of a defendant").

Unless the federal courts of appeal and this court all lack common sense, our analysis must go deeper than "common sense" to ascertain the meaning of the word "knowledge" in RCW 69.50.505. *See One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002) ("Furthermore, a court should not apply a mechanical definition but rather should interpret the meaning of terms in the context of the statute as a whole and consistently with the intent of the legislature.") (citing *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 693, 743 P.2d 793 (1987)).

Although the majority correctly notes that the legislature "is familiar with objective versus subjective 'knowledge'" it incorrectly concludes that because the legislature "could have defined knowledge with an objective definition" they clearly meant "knowledge" to encompass only subjective knowledge. Majority at 9-10 (citing other statutes in which the legislature has "utilized terms to require objective versus subjective knowledge"). My research reveals that the legislature has also utilized terms to require *subjective* knowledge, with the phrase "actual knowledge." RCW 7.60.190; RCW 9.45.260; RCW 11.02.110; RCW

11.160.100; RCW 19.174.030; RCW 19.270.020; RCW 46.32.110; RCW 69.43.060; RCW 73.20.060. The legislature's use of clearly subjective or clearly objective standards of knowledge by specific phrasing in other statutes only affirms the ambiguity of the nonspecific term as it is used in RCW 69.50.505.

While courts searching for the meaning of words in a statute may turn to the dictionary to ascertain that meaning, in this case the dictionary reveals more than one possible meaning for the word "knowledge." Webster's Third New International Dictionary 1252-53 (2002) (listing two main definitions of the word "knowledge" and a total of six subdefinitions. Examples of these definitions include: "to recognize as being something indicated;" "to recognize, admit, or confess the fact or truth of;" "the fact or condition of knowing."). While the difference between those definitions may not be significant in the course of everyday conversation, that difference becomes significant when "knowledge" is used as a substantive legal standard. *See Gellman v. United States*, 235 F.2d 87, 93 (8th Cir. 1956) (discussing the definition of the word "retail" the *Gellman* court noted: "Where words are susceptible of several meanings, the court is at liberty to determine . . . the sense in which the words were used *in a statute*." (emphasis added)).

This court has recognized that "knowledge" is a "technical term." *See State v. Scott*, 110 Wn.2d 682, 688-90, 757 P.2d 492 (1988) (analyzing "knowledge" under the technical term rule). Our recognition of the nuance inherent in the word "knowledge" is supported by its historical use as a substantive legal standard. When legislators use the term "knowledge" in a statute it is often to

describe the legal burden a party must meet to establish a given fact, defense, or element of a crime. As such a term, knowledge is susceptible to many meanings. *See generally United States v. Cook*, 497 F.2d 753, 764 (9th Cir. 1972) (Ely, J., dissenting) ("The majority recognizes that the term 'any knowledge' is vague, and the trial court's attempted definition of the phrase indicates the variety of meanings to which the expression may be subjected.").

Admittedly, the legislature left us without much guidance as to its intention for the meaning of the term "knowledge." The legislative history reveals that the phrase "knowledge or consent" has not been altered once since the legislature adopted the uniform controlled substance act in 1971. *Compare* former RCW 69.50.505(a)(4)(ii) (1971) ("knowledge or consent") *with* RCW 69.50.505(1)(d)(ii) ("knowledge or consent").

As noted above, the legislature has used more definitive phrases to indicate either actual knowledge or objective knowledge throughout the Washington State code. No real guidance can be had from the presence of those more definitive phrases elsewhere in the code.

Black's Law Dictionary lists both actual and constructive knowledge under its definition of "knowledge." Black's Law Dictionary 888 (8th ed. 2004) (listing 10 separate definitions of "knowledge" and defining, *e.g.*, "actual knowledge" as "[d]irect and clear knowledge, as distinguished from constructive knowledge" and "constructive knowledge" as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given

person").

Additionally, our ability to rely on federal analysis is limited as the circuit courts remain split on whether the word requires subjective or objective knowledge. *1813 15th St., N.W.*, 956 F. Supp. at 1035 ("Whether the claimant must prove absence of actual knowledge of the illegal activity or the more demanding burden of absence of constructive knowledge of the illegal activity is a split issue amongst the circuits.") (citing cases). This split remains, in part, because the federal innocent owner provision was deleted from the uniform controlled substance act in April 2000 and replaced with a "uniform innocent owner defense applicable to all federal civil forfeiture cases except those under Title 19 and a few other statutes." 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 4.02[6][c][i], at 4-31 (2009).

While the exact meaning of "knowledge" in RCW 69.50.505 remains unclear, what is clear is that our legislature did not write the innocent owner exception to allow everyone save the person who committed the crime giving rise to forfeiture to qualify as an innocent owner. Statutes that exempt everyone save the perpetrator are *criminal* forfeiture statutes. Our legislature purposely adopted a *civil* forfeiture statute in order to "remove the profit incentive from drug trafficking." *31641 W. Rutherford St.*, 120 Wn.2d at 88 (citing *United States v. 141st St. Corp. by Hersh*, 911 F.2d 870, 879 (2d Cir. 1990)); 1 Steven L. Kessler, *Civil and Criminal Forfeiture: Federal and State Practice* § 10:45, at 10-396 (2001) ("Washington's civil drug forfeiture statute is codified in the state's Food, Drugs & Cosmetics Law." (footnote omitted)). Additionally, as part of the Uniform Controlled Substances Act,

chapter 69.50 RCW, the forfeiture provision was designed to aid states in "confiscating the vehicles and instrumentalities used by drug traffickers" in order to "prevent their use in the commission of subsequent offenses." Unif. Controlled Substances Act § 505 cmt. (amended 1973), 9 U.L.A. 899 (2007). These purposes, combined with the civil nature of the act, make it clear that the legislature did not envision allowing all to qualify as innocent owners so long as they did not commit the crime.

The majority appears to agree with this court's holding in *31641 West Rutherford Street* that "objective facts [can] be used to determine subjective knowledge." Majority at 11; *31641 W. Rutherford St.*, 120 Wn.2d at 91. In the context of the forfeiture statute, I see no difference between concluding from objective facts that a claimant had subjective knowledge in the face of his denial and saying that he "should have known."[3] The facts of this case make this clear: the Rooses claim they "had no knowledge of what [Thomas] was using the car for or contents in the car *at that time*." I CP at 52 (emphasis added). Yet, the record demonstrates that as of August 16, 2005, Alan Roos knew that Thomas had been arrested in the family Nissan with a "brick" of cocaine. The majority's holding allows the Rooses to disclaim all knowledge of Thomas' drug activity *even after* this occurred.

The majority seems to accept the Rooses' assertion that because *at the time* Thomas was driving around in the Chevelle with numerous controlled substances they

[3] The Court of Appeals would impose a duty on claimants to know everything that would arise from a "reasonable inquiry" into the use of their property. *In re Forfeiture of Chevelle*, 140 Wn. App. at 813. I do not think the legislature intended this extra burden to be placed on claimants.

had no idea what he was up to, they can qualify as innocent owners. But how is the State to ever rebut the claimant's assertion that he did not know of the illegal activity as it was occurring? The only thing that comes to my mind is for the State to show that the claimant was actually involved in the activity giving rise to the forfeiture. Indeed, this is what the majority appears to suggest the standard of knowledge should be: "Such instances require proof of someone actually doing something to support or facilitate the commission of a crime or actually knowing and assisting in the criminal activity in order to be subject to criminal sanctions." Majority at 11. This is not the standard established by the legislature.

The majority's holding significantly alters the statute by allowing any one who did not participate in the crime to automatically qualify as an innocent owner simply by stating she had no knowledge of the activity giving rise to the forfeiture at the time it was occurring. This effectively turns the legislature's adoption of a *civil* statute into a *criminal* statute.

To determine the appropriate standard to be applied in this case, I suggest we take a page from the United States Supreme Court's book on the analogous federal innocent owner exemption:

> [W]hether or not the text of the statute is sufficiently ambiguous to justify resort to the legislative history, equitable doctrines may foreclose the assertion of an innocent owner defense by a party with guilty knowledge of the tainted character of the property.

United States v. 92 Buena Vista Ave., 507 U.S. 111, 129-30, 113 S. Ct. 1126, 122 L. Ed. 2d 469 (1993). In fact most courts,

whether applying the constructive or the subjective standard of knowledge refuse to allow "willfully blind" claimants to benefit from the innocent owner exception. *141st St. Corp.*, 911 F.2d at 877 ("there was substantial evidence from which the jury could have concluded that [claimant] was aware of the drug trafficking); *1813 15th St., N.W.*, 956 F. Supp. at 1036 ("Faced with overwhelming evidence to the contrary, a claimant cannot rely upon mere denials to prove an absence of actual knowledge, but rather must come forward with something more substantial."); *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895, 906 (11th Cir. 1985) ("the district court properly applied the 'actual knowledge' standard, and found sufficient evidence to support an inference that [claimant] had actual knowledge of the drug taint"); *United States v. 8848 S. Commercial St.*, 757 F. Supp. 871, 883 (1990) ("when there is objective evidence in the record sufficient to support an inference of the claimant's actual knowledge, the claimant must do more than simply deny knowledge in order to meet his or her burden of proof").

Even in *31641 W. Rutherford Street*, 120 Wn.2d at 91, we noted that "facts and the reasonable inferences therefrom viewed in the light most favorable to the plaintiffs would raise genuine issues of fact regarding [claimant's] knowledge of . . . the illegal conduct."

The hearing officer made reasonable inferences from the facts established at the hearing to hold, essentially, that the Rooses had "guilty knowledge" and could not avoid this knowledge simply by "[sticking their heads] in the sand." Pet. for Review, App. 2, at 12. The hearing officer's holding is similar to that in *8848 South Commercial Street*, 757 F. Supp. at 883: "when there is objective

evidence in the record sufficient to support an inference of the claimant's actual knowledge, the claimant must do more than simply deny knowledge in order to meet his or her burden of proof."

The statute placed the burden on the Rooses to disprove they knew of Thomas' drug activity in the family cars. They cannot meet this burden simply by claiming they did not know of the events taking place at the time the car was seized. I would uphold the hearing officer's forfeiture of the Chevelle on the basis of his inference that Alan and Stephne knew of their son's drug activity in the car. The evidence from August 15, 2005, on, supports this inference. Prior to that date, the evidence as to the Rooses' knowledge is insufficient to support a finding of knowledge under the statute. I agree that the Rooses met their innocent owner burden of proof as to the Nissan.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:
Justice Susan Owens

Justice Mary E. Fairhurst

Justice James M. Johnson